MYDEPOT SDN BHD v. CLARITY EXCEL SDN BHD

HIGH COURT MALAYA, SHAH ALAM
TUN ABD MAJID HAMZAH JC
[CIVIL APPEAL NO: BA-12BNCVC-6-01-2019]
27 SEPTEMBER 2019

CIVIL PROCEDURE: *Appeal – Memorandum of appeal – Record of appeal filed without memorandum of appeal – Whether memorandum of appeal must be filed with record of appeal – Whether there were cogent and valid reasons for delay in filing and serving memorandum of appeal – Whether unavailability of grounds of judgment valid reason for non-filing of memorandum of appeal – Whether extension of time ought to be granted for filing of memorandum of appeal – Whether court has discretion to extend time – Whether procedure prescribed by Rules of Court of Appeal 1994 applicable – Rules of Court 2012, O. 55 r. 4*

The appellant filed a notice of appeal against the decision of the Sessions Court and filed the record of appeal within time but without the memorandum of appeal ('MOA'). The respondent raised a preliminary objection following the absence of the MOA. This prompted the appellant to file the MOA and, by way of encl. 17, for an extension of time to file the MOA, which was delayed by four days, on the grounds that (i) the grounds of judgment was not available; (ii) the MOA, if filed, may contain errors or inaccurate grounds; (iii) O. 55 r. 4 of the Rules of Court 2012 ('ROC') does not specifically provide that the MOA should be filed despite the absence of the grounds of judgment and, as such, the appellant adopted the procedure under the Rules of the Court of Appeal 1994 ('ROCA'); (iv) the hearing of the appeal had not been fixed yet and the parties have yet to file their written submissions; (v) the MOA had subsequently been filed; (vi) the delay of four days did not prejudice the respondent; and (vii) by virtue of the decision of the Court of Appeal in *Cosway (M) Sdn Bhd v. Gan Poh Im* ('*Cosway*'), the court has the discretion to extend the time. Opposing encl. 17, the respondent argued that (i) it is a mandatory requirement that the record of appeal should contain the MOA notwithstanding the unavailability of the grounds of judgment; (ii) the MOA filed may be amended and be included in the supplementary record of appeal together with the grounds of judgment; (iii) the MOA, which was filed without leave and without being accompanied with the application for extension of time, was defective; (iv) no cogent and valid reasons given for the delay in filing and serving the MOA; and (v) the ROCA did not apply.

Held (dismissing application with costs):

(1) There is no ambiguity in the language as far as O. 55 r. 4 of the ROC is concerned. Order 55 r. 4(1)(d) of the ROC clearly provides that the MOA has to be included in the record and it is also provided that the same can be amended once the grounds of judgment is available.

A Notwithstanding the mandatory provision of O. 55 r. 4 of the ROC, the court was vested with the discretion to entertain the application for extension of time as decided by the Court of Appeal in *Cosway*. (paras 8 & 10)

(2) The ROCA had no application as this matter originated from the B Sessions Court. Given the clear language in O. 55 r. 4 of the ROC, it could not be fathomed how the appellant could argue that there was ambiguity in the said provision and opted to follow the ROCA. The failure to incorporate the MOA was a blatant disregard of the rules. (paras 12 & 15)

C **Case(s) referred to:**

Chuah Tim Lan v. RHB Bank Bhd & Anor [2008] 6 CLJ 500 CA ***(refd)***
Cosway (M) Sdn Bhd & Anor v. Gan Poh Im [2005] 1 CLJ 573 CA ***(refd)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***
D *Hafizzuddin Noordin v. Pacific & Orient Insurance Co Bhd [2015] 10 MLJ 612* ***(refd)***
Metroport Air Services Sdn Bhd v. Cargostreetz Sdn Bhd [2018] 1 LNS 1814 HC ***(refd)***
Owners Of the Ship Or Vessel "SASACOM I" v. Bank Pembangunan Malaysia Bhd [2015] 1 CLJ 392 CA ***(foll)***
Raja Guppal Ramasamy v. Sagaran Pakiam [1999] 2 CLJ 972 CA ***(refd)***
Tan Chai Huat v. Yap Tian Leong [2018] 1 LNS 423 HC ***(refd)***
E *Yaw Fun Fun v. Ketua Polis Daerah Gombak, Selangor & Ors [2018] 1 LNS 752 HC* ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1A, O. 3 r. 5, O. 55 r. 4(1)(d)
Rules of the Court of Appeal 1994, r. 18
F Subordinate Courts Rules 1980, O. 49 r. 3A

For the appellant - Lim Wei Han; M/s Shu Yin, Teh & Taing
For the respondent - Ahmad Zulkefli; M/s Hasan Sabri & Hashim Nazri

Reported by Najib Tamby

G **JUDGMENT**

Tun Abd Majid Hamzah JC:

[1] The appellant on 18 January 2019 has filed a notice of appeal against the decision of the Sessions Court and duly filed the record of appeal within time (17 February 2019) but without the memorandum of appeal. During the H case management on 19 February 2019, the respondent raised a preliminary objection as regards the absence of memorandum in the record of appeal. The appellant subsequently on 22 February 2019 filed the memorandum of appeal and on 25 February 2019 *vide* encl. 17 sought to obtain an extension of time to file its memorandum of appeal which was delayed by four days. I Having heard the arguments, I dismissed the appellant's application with costs.

Enclosure 17

[2] The application for an extension of time as affirmed by the appellant in his affidavit in support was premised upon:

(i) the grounds of judgment was not available;

(ii) the memorandum, if filed, may contain errors or inaccurate grounds;

(iii) Order 55 r. 4 of the Rules of Court 2012 does not specifically provide that the memorandum of appeal should be filed despite the absence of the grounds of judgment, as such his solicitor adopted the procedure as provided by the Rules of the Court of Appeal 1994;

(iv) the hearing of the appeal has not been fixed yet and the parties have yet to file their written submissions;

(v) the memorandum of appeal has subsequently been filed on 22 February 2019; and

(vi) the delay of four days does not prejudice the respondent.

[3] In opposing this application, the respondent stated as follows:

(i) it is a mandatory requirement that the record of appeal should contain the memorandum of appeal notwithstanding the unavailability of the grounds of judgment;

(ii) the memorandum of appeal filed may be amended and be included in the supplementary record of appeal together with the grounds of judgment;

(iii) the memorandum of appeal which was filed on 22 February 2019 without leave and without being accompanied with the application for extension of time is defective;

(iv) no cogent and valid reasons given for the delay in filing and serving the memorandum of appeal; and

(v) the Rules of the Court of Appeal 1994 does not apply;

[4] The matter was fully heard before the learned Sessions Court Judge ("SCJ"), it was a decision after a trial and as the matter emanated from the Sessions Court, the procedure for the preparation of the record of appeal is set out in O. 55 r. 4 of the Rules of Court 2012 ("RC 2012") which provides as follows:

> 4(1) In the case of an appeal from a decision after trial, the appellant shall within one month from the date of filing of notice of appeal prepare and file the requisite number of copies of the record of appeal and the record shall contain copies of

A (a) the relevant pleadings;

(b) the notes of evidence, including witness statements, if available;

(c) the grounds of judgment, if available;

(d) the memorandum of appeal;

B (e) the decision, order or judgment;

(f) a duplicate copy of the notice of appeal;

(g) a duplicate copy of the notice of cross appeal, if any;

(h) all such documentary exhibits and other documents the parties shall C consider relevant for the purposes of the appeal:

Provided that the record of appeal shall be filed notwithstanding that the notes of evidence and/or grounds of judgment are not ready or that the sealed decision, order or judgment has not been extracted.

D (2) In the event the notes of evidence and/or grounds of judgment are not ready or the sealed decision, order or judgment has not been extracted within the period specified in rule 4(1) above, then the notes of evidence and/or grounds of judgment, where they are made available and a copy of the sealed decision, order or judgment when extracted, shall be filed by way of a supplementary record of appeal without leave of the E High Court:

Provided also that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal.

(3) The memorandum of appeal shall be substantially in Form 112 and shall set forth concisely and under distinct heads, without argument or F narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively. Notwithstanding rule 8 of this Order, where a supplementary record of appeal is to be filed pursuant to rule 4(2) above, the appellant may if necessary also include in the supplementary record of appeal an amended memorandum of G appeal, without leave of the High Court.

(4) …

(5) …

(6) …

H (7) …

(8) ….

Submissions

[5] Learned counsel for the appellant referred to O. 3 r. 5 RC 2012 and I relied on *Cosway (M) Sdn Bhd & Anor v. Gan Poh Im* [2005] 1 CLJ 573; [2006] 1 MLJ 568 in support of his argument that the court has the discretion to

extend the time as prayed for. It was further submitted that without the benefit of the grounds of judgment, the issues raised in the memorandum of appeal may be misleading and inaccurate. Learned counsel also referred to the proviso of r. 4(1) which led to the uncertainty as it only mentions the notes of evidence and/or the grounds therefore, he opted to adopt the procedure in the Rules of the Court of Appeal ("RCA1994").

[6] In addition, learned counsel submitted that the hearing of the appeal has not been fixed yet and it was still at the early stage and the delay was only four days thus, the respondent was not prejudiced. References were also made to the cases of *Hafizuddin bin Noordin v. Pacific & Orient Insurance Co Bhd* [2015] 10 MLJ 612 and *Yaw Fun Fun v. Ketua Polis Daerah Gombak, Selangor & Ors* [2018] 1 LNS 752; [2018] MLJU 714.

[7] Learned counsel for the respondent submitted that under O. 55 r. 4 RC 2012 it was mandatory to file the record of appeal incorporating the memorandum of appeal and the said memorandum may be amended and re-filed together with the grounds of judgment subsequently. The absence of the memorandum would render the record of appeal defective. References were made among others to *Tan Chai Huat v. Yap Tian Leong* [2018] 1 LNS 423; [2018] MLJU 383; *Metroport Air Services Sdn Bhd v. Cargostreetz Sdn Bhd* [2018] 1 LNS 1814; [2018] MLJU 1695; *Raja Guppal Ramasamy v. Sagaran Pakiam* [1999] 2 CLJ 972; [1999] 2 MLJ 677 and *Chuah Tim Lan v. RHB Bank Bhd & Anor* [2008] 6 CLJ 500; [2008] 6 MLJ 793. The learned counsel further submitted that following *Duli Yang Amat Mulia Tunku Ibrahim Ismail ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149, O. 1A RC 2012 cannot be invoked.

Decision

[8] Notwithstanding the mandatory provision of O. 55 r. 4 RC 2012, I agreed with learned counsel for the appellant that this court is vested with the discretion to entertain the application for extension of time as decided by the Court of Appeal in *Cosway* (*supra*).

[9] In *Cosway* (*supra*) the previous counsel for the appellant made a mistake by filing the memorandum of appeal together with the appeal record which was not a requirement then and upon realising his mistake six weeks later, counsel re-filed the same memorandum which by then was already out of time. The High Court refused the appellant's application for an extension of time. The Court of Appeal in allowing the appeal held that the respondent was not prejudiced since the latter had notice of the said memorandum which was filed earlier and there was no blatant disregard of the rules.

[10] Order 55 r. 4(1)(d) RC 2012 clearly provides that the memorandum of appeal has to be included in the record and it is also provided that the same can be amended once the grounds of judgment is available. Unlike the previous position under O. 49 r. 3A of the Subordinate Courts Rules 1980 where there were conflicting decisions which was eventually put to rest by *Cosway* (*supra*). There is no ambiguity in the language as far as O. 55 r. 4 RC 2012 is concerned.

[11] This was not the position previously where the then Subordinate Courts Rules 1980 O. 49 r. 3A provides:

> (1) When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this Order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of:
>
> (a) the relevant pleadings;
>
> (b) the notes of evidence in proceedings recorded wholly or partly by mechanical means;
>
> (c) the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;
>
> (d) the decision;
>
> (e) the notice of appeal;
>
> (f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.
>
> (2) If the appellant shall consider that any documentary exhibit used need not be included in the record he shall obtain the consent in writing of all parties to the appeal to the omission of the document from the record. Such written consent shall be included in the appeal record.
>
> (3) Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.
>
> (4) The appellant shall within the period limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

Nowhere does this provision make any reference to the memorandum of appeal and that was the cause of the confusion. Previously, the memorandum of appeal did not form part of the appeal record. But O. 55 r. 4 RC 2012 has altered the position where presently, the memorandum of appeal is part of the appeal record.

[12] I agreed with the contention of learned counsel for the respondent that the RCA 1994 has no application as this matter originated from the Sessions Court. Given the clear language in O. 55 r. 4 RC 2012, I cannot fathom how learned counsel for the appellant could argue that there is ambiguity in the said provision and opted to follow the RCA 1994.

[13] In *Duli Yang Amat Mulia Tunku Ibrahim Ismail* (*supra*) Zaki Azmi CJ at p. 345 (CLJ); p. 163 (MLJ) had this to say with regard to O. 1A:

> A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules.

[14] The Federal Court examined whether the provision which had been infringed was fundamental or otherwise for O. 1A to be applicable. To my mind, the requirement to incorporate the memorandum of appeal is fundamental and I find support in the Court of Appeal's case of *Owners of the Ship or Vessel "SASACOM I" v. Bank Pembangunan Malaysia Bhd* [2015] 1 CLJ 392; [2015] 4 MLJ 841 which took a serious stand on compliance with the rules in particular r. 18 of the RCA 1994 concerning the undated memorandum of appeal and failure to incorporate the amended judgment in the record of appeal. It was held by Abdul Wahab Patail JCA at p. 397 (CLJ); p. 845 (MLJ):

> The purpose of the provision in r 18 to file a memorandum of appeal is to give the respondent the opportunity to prepare and respond to the grounds laid out in the memorandum of appeal. It is a fundamental rule of justice. The appellant cannot put forward without leave of the court any other ground: see r. 18 sub-r (2). It is clear that a signed but undated memorandum of appeal fails to comply with r. 18. The breach in this case is therefore a breach of a fundamental rule and cannot be excused in a court of justice on the grounds of inadvertent error or on the assertion it does not prejudice the respondent.

[15] The Court of Appeal dealt with a defective memorandum of appeal whereas before me is the absence of same. I consider the failure to incorporate the memorandum of appeal as a blatant disregard of the rules. The application was therefore dismissed with costs.